R. 26.275(f)(2)(B) specifically provides that a customer who does not make an affirmative choice defaults to the serving CLEC toll provider.[53] Section 26.275(f)(2)(B) provides:

> An existing customer who does not make a choice for an intraLATA PIC when intraLATA equal access becomes available shall default to the serving CTU [certificated telecommunications utility] for intraLATA 1+ and 0+ calls where the serving CTU is an intraLATA toll provider. Otherwise, the customer shall dial a carrier access code to route his intraLATA toll calls to the carrier of his choice until he or she makes a permanent, affirmative selection for intraLATA 1+ and 0+ calls.

2. Discussion

The Arbitrators reject Birch/ALT's and Sage's argument that a default intraLATA carrier is not considered an LPIC.[54] Section 5.2.2.2.1.2 in Appendix Pricing UNE is very clear on this issue. An intraLATA toll call will be routed to the end user LPIC after the implementation of dialing parity. If a CLEC customer chooses an LPIC or if he makes no choice, on the assumption that he will default to his local carrier, the intraLATA carrier would be the LPIC.

Similarly, the Arbitrators do not agree with SWBT's interpretation of the term LPIC and of its application to the routing issue. Contrary to SWBT's claim,[55] routing an intraLATA call to the LPIC is not the same as routing an interLATA call to a PIC.[56] An interLATA call has to be routed outside the LATA network through an IXC's POP, since

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[53] Direct Testimony of Sean Minter at 10-11 (May 3, 1999); Direct Testimony of Gary Nuttall at 15-16 (June 15, 1999).

[54] Tr. at 301-302 (July 13, 1999).

[55] SWBT Brief at 5 (July 22, 1999).

[56] *See* Arbitrators' analysis on DPL Issues Nos. 1 and 4.

it cannot be done on SWBT's own network.[57] Conversely, intraLATA calls can, and are, currently being routed using SWBT's network in an efficient way.[58]

SWBT's use of the term POP is misleading. The term POP is commonly used in the telecommunication world to denote a very specific situation. A POP is typically considered to be the demarcation point between the networks of the incumbent carrier and the IXC. This demarcation point has generally been associated with the application of an access charge structure.[59] The Arbitrators note that they have rejected SWBT's analogy between interLATA and intraLATA traffic, and that the associated compensation issues will be dealt with in the Arbitrators' analysis of DPL Issue Nos. 6 and 7.

Nothing in the interconnection agreement prohibits Sage and Birch/ALT from using UNEs all the way to the terminating end office, in order to provide intraLATA toll service to their customers.[60] Therefore, they are not obligated to use a POP when routing intraLATA calls.[61] They do, however, utilize tandem switching and common transport as UNEs in routing intraLATA calls. Both tandem switching and common transport are shared facilities[62] and can be purchased as UNEs or combination of UNEs by Sage and

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[57] Section 271(a) in the FTA states: "Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services, except...". Since SWBT have not yet been granted entry to the interLATA market according to the same section, interLATA calls cannot be completed using SWBT network at this time.

[58] *See* Arbitrators' ruling on DPL Issues Nos. 1 and 4.

[59] When a call is routed back from the IXC network to the incumbent network, access charges apply.

[60] *See* Arbitrators' analysis of DPL Issue Nos. 6 and 7.

[61] A CLEC may have a POP for routing intraLATA toll calls. This is an economic decision that is available to the CLEC. (*See* Arbitrators' analysis on DPL Issues Nos. 1, 4 and 10.)

[62] Tandem switching is defined as "the basic switching ***function*** of connecting trunks to trunks" (emphasis added, see Section 6.1 in Attachment 6). Common Transport is defined as "a ***shared*** interoffice transmission path" (emphasis added, *see* Section 8.1.1 in Attachment 6)

Birch/ALT. As a result, the POP, a demarcation point between the networks, does not apply to this situation.

3. Arbitrators' Ruling

The interconnection agreement requires SWBT to route an intraLATA call to the LPIC selected by the end user. However, the basic principles of parity found in both federal and state law apply to SWBT's routing arrangements.[63] Therefore, SWBT is required to route an intraLATA call carried by Sage or Birch/ALT in the same way SWBT routes its own intraLATA traffic.

C. DPL Issue Nos. 2 and 3

DPL Issue No. 2: Is SWBT required to provide intraLATA dialing to CLECs purchasing UNEs under the interconnection agreement after SWBT implements intraLATA equal access on May 7, 1999?

DPL Issue No. 3: Is SWBT required to provide intraLATA toll dialing functionality under the FTA, if a CLEC purchases ULS common/blended transport, *etc.*?

1. Parties' positions

[63] *See* Arbitrators' analysis on DPL Issues Nos. 1 and 4.

The parties do not dispute whether SWBT is required to provide intraLATA dialing parity. Instead, their dispute seems to be focused on how intraLATA dialing parity should be provisioned. [64]

2. Discussion

The FTA lists dialing parity as the duty of each local exchange carrier.[65] The FTA defines dialing parity as:

> The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.[66]

The Federal Communications Commission (FCC) goes on to explain: "Dialing parity enables a customer of a new entrant to dial others with the convenience an incumbent provides, regardless of which carrier the customer has chosen as the local service provider."[67]

According to Section 5.2.1 of Attachment 6 – UNE of the interconnection agreement, SWBT is required to provide the local switching UNE so that the dialing plan associated with the port will be equal to the dialing plan established in the [central] office for SWBT's own customers. Since the local switching element allows SWBT customers to dial 1 + for intraLATA calls after SWBT implements dialing parity, SWBT should

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[64] Direct Testimony of Rachel Bernstein at 9-11 (June 15, 1999); Direct Testimony of Sean Minter at 13 (May 3, 1999); Direct Testimony of Gary Nuttall at 14-17 (June 15, 1999).

[65] FTA § 251(b)(3).

[66] *Id.*

[67] First Report and Order at ¶17.

provide the same functionality to CLEC customers.[68] Moreover, even if a SWBT customer failed to affirmatively choose an intraLATA PIC, that customer could still dial 1 + for intraLATA calls because SWBT populates the switch port with the default LPIC code.[69] Allowing this same opportunity for Sage and Birch/ALT customers is consistent with P.U.C. SUBST. R. 26.275 (relating to IntraLATA Equal Access), in that the default to the serving certificated telecommunications utility (CTU), (in this case, Sage or Birch/ALT), is appropriate because both are intraLATA toll providers.[70] Section 26.275(f)(2)(B) clearly provides that the dial-around requirement is only triggered when the customer has failed to make an affirmative LPIC choice and the serving CTU is not an intraLATA toll provider.

Yet SWBT interprets this regulation somewhat differently. As shown in SWBT's Accessible Letter[71] regarding the implementation of dialing parity, SWBT asserts that the dial-around requirement is triggered unless a local service request (LSR) is generated for a certain CLEC account. In other words, SWBT assumes that a CLEC is not an intraLATA provider unless it obtains a separate Carrier Identification Code (CIC) and generates LSRs reflecting the CIC; until that occurs, the CLEC's customers would be forced to dial-around. SWBT argues that Birch/ALT or Sage customers would not be required to dial more digits than SWBT customers would, although the basis for this assertion is unclear.[72]

3. Arbitrators' Ruling

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[68] Direct Testimony of Gary Nuttall at 16-17 (June 15, 1999).

[69] Tr. at 319-320 (July 13, 1999).

[70] P.U.C. SUBST. R. 26.275(f)(2)(B).

[71] Direct Testimony of Gary Nuttall Attachment GPN-3 (June 15, 1999).

[72] SWBT Brief at 13-14 (July 22, 1999).

After SWBT implements intraLATA dialing parity and a CLEC customer chooses an intraLATA PIC (LPIC), including the CLEC itself, to carry their intraLATA toll calls, the CLEC customer should not be required to dial any more digits than a SWBT customer must dial. Additionally, as the Arbitrators have found in DPL Issue Nos. 8, 9 and 10, Sage and Birch/ALT are not required to obtain a separate CIC or generate LSRs reflecting the CIC in order to continue providing intraLATA toll service after the implementation of intraLATA dialing parity. Therefore, the Arbitrators conclude that the provision of intraLATA dialing parity when Sage and Birch/ALT provide intraLATA toll service is not triggered by the use of a separate CIC or generation of LSRs. Finally, it should be noted that the requirement to provide intraLATA toll dialing functionality does not differentiate between the various routing methods by which a CLEC could provide service. Accordingly, the Arbitrators answer both DPL Issues Nos. 2 and 3 in the affirmative.

D. DPL Issue No. 10

DPL Issue No. 10: Should a CLEC be required to obtain a CIC and/or obtain other business arrangements to provide intraLATA toll after SWBT implements intraLATA equal access?

1. Parties' positions

It is SWBT's position that, after the implementation of dialing parity, Section 5.2.2.2.1.2 of Appendix Pricing - UNE-Texas requires intraLATA calls to be routed exactly like interLATA calls. This would result in a CLEC end-user customer's intraLATA calls being routed to the end-user's LPIC at SWBT's tandem through the mechanism of a CIC, just like interLATA toll calls are routed. SWBT claims that when

the SWBT central office screens the intraLATA call, a CIC is required to identify the intraLATA toll carrier.[73]

Sage and Birch/ALT claim that there is no technical reason why they should obtain a CIC or make any other business arrangements in order to offer intraLATA toll service after SWBT implements intraLATA equal access.[74] Sage also notes that requiring Sage to obtain a CIC would restrict it from fully using the UNEs used previously to provide intraLATA toll service.[75]

2. Discussion

The term "Carrier Identification Code" or CIC implies that it is some sort of identification mechanism. However, during the hearing on the merits, it became evident that the CIC is actually a routing mechanism, rather than an identification mechanism.[76] All parties agreed that the CIC is not used for billing the CLEC for intraLATA calls.[77] As explained by the SWBT witness: "So in a post-dialing parity situation, when we have numerous carriers that can carry this traffic, we must have a carrier identification code to know *where* to route that traffic..." (emphasis added).[78]

The FCC has held that "the local switching element includes all vertical features that the switch is capable of providing ... as well as any technically feasible customized

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[73] Direct Testimony of Rachel Bernstein at 11 (June 15, 1999).

[74] Direct Testimony of Gary Nuttall at 21 (June 15, 1999); Rebuttal Testimony of Sean Minter at 11-12 (June 24, 1999).

[75] Sage Brief at 16 (July 22, 1999).

[76] Tr. at 120 (July 13, 1999).

[77] *Id.* at 282-285.

[78] *Id.* at 86.

routing functions."[79] In addition, the FCC later clarified that "requesting carriers that take unbundled local switching have access to the incumbent LEC's routing table, resident in the switch."[80] SWBT's witness also agreed that SWBT is required under the FTA to allow the CLEC to use SWBT's routing instructions.[81]

3. Arbitrators' Ruling

The Arbitrators conclude that the CIC is a routing mechanism. It resides in the originating end office switch,[82] and populates and works in conjunction with the routing table that resides in the originating SWBT end office.[83] The Arbitrators reject SWBT's assertion that the implementation of Section 5.2.2.2.1.2 of Appendix Pricing – UNE is possible only through the use of a separate CIC by Sage and Birch/ALT. The Arbitrators conclude that the only reason SWBT advocates a separate CIC is to support its position that in a post-dialing parity environment, all intraLATA calls handled by Sage or Birch/ALT must be routed to a POP outside of SWBT's network, just like interLATA calls are routed. Section 5.2.2.2.1.2 of Appendix Pricing-UNE-Texas in the SWBT-Sage and SWBT-Birch/ALT states:

> After the implementation of intraLATA Dialing Parity, intraLATA toll calls from [CLEC] ULS Ports will be routed to the end user intraLATA Primary Interexchange Carrier (PIC) choice. When an interLATA toll call is initiated from an ULS port it will be routed to the end user interLATA PIC choice.

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[79] First Report and Order ¶ 412.

[80] Third Order on Reconsideration ¶ 23.

[81] Tr. at 235 (July 13, 1999).

[82] *Id.* at 120.

[83] *Id.* at 137-138.

SWBT's witness testified that nothing in the above section requires Sage or Birch/ALT to obtain a CIC but they must use a CIC in order for their intraLATA calls to be routed exactly like interLATA calls.[84] However, as the Arbitrators have concluded under DPL Issue Nos. 1 and 4, Section 5.2.2.2.1.2 merely portrays the post-dialing parity scenario in which intraLATA toll calls and interLATA calls originated by a CLEC's end-user customer are routed to the customer's PIC choice; this section does not require that the physical routing and transport of intraLATA and interLATA calls be handled identically. The use of a separate CIC by Sage and Birch/ALT to ensure that intraLATA and interLATA calls are treated identically is unwarranted. Furthermore, the SWBT witness testified that it would be technically feasible to route intraLATA calls originated by a Sage or Birch/ALT end user customer without the use of a separate CIC by Sage or Birch/ALT after dialing parity is implemented *if Sage and Birch/ALT use Southwestern Bell's CIC.*[85] SWBT's witness also testified that SWBT is using 9100 as its CIC to route its intraLATA traffic.[86] The Arbitrators rule that Sage and Birch/ALT should be allowed to use SWBT's CIC and the associated routing instructions. The use of SWBT's CIC would allow intraLATA calls handled by Sage and Birch/ALT for their end-user customer to be routed end-to-end on SWBT's network.

SWBT claims that allowing a CLEC to use SWBT's own CIC would make SWBT the LPIC of the CLEC end user.[87] As explained above, the CIC is used for routing, not for billing. SWBT's witness agreed that it is technically feasible for a CLEC to route intraLATA calls after dialing parity is implemented using SWBT's CIC. Both parties agreed that this is how Sage and Birch/ALT intraLATA traffic is being routed currently. To the extent SWBT believes it needs to differentiate between carriers using

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[84] *Id.* at 169-170.

[85] *Id.* at 221-222.

[86] *Id.* at 175.

[87] SWBT's Reply Brief at 11 (July 28, 1999).

the CIC in order for it to provide intraLATA toll service to CLEC customers, SWBT should bear all the costs associated with the implementation of a change.

If Sage and/or Birch/ALT decide in the future to use different routing instructions than those used by SWBT, Sage and Birch/ALT would have to bear all the costs associated with that change. The Arbitrators believe that such a change could be possible in the evolving competitive market, once a carrier has a big enough customer base.

The Arbitrators also reject any requirement for additional business arrangements by CLECs such as direct trunking or interconnection with other carriers or additional trunks to purchase a CIC or tandems. As discussed in DPL Issue Nos. 1 and 4, intraLATA calls should not be routed in the same way as are interLATA calls. Further, as discussed in DPL Issues Nos. 6 and 7, the use of UNEs should not be restricted once intraLATA dialing parity is implemented. This ruling is not intended to limit a carrier's ability to make such arrangements; in the event a CLEC decides that it needs to route its intraLATA traffic differently than the way SWBT routes its intraLATA traffic, whether through business arrangements such as direct trunking, customized routing or agreements with another carrier, it should be able to do so.[88]

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[88] Tr. at 188-189 (July 13, 1999).

E. DPL Issue Nos. 6 and 7

DPL Issue No. 6: Is SWBT being compensated by CLECs purchasing unbundled local switching (ULS), unbundled interoffice common/blended transport for their use of SWBT's network to provide intraLATA toll service to the CLEC's end users?

DPL Issue No. 7: Should Birch/ALT and Sage be allowed to use unbundled interoffice common transport from the tandem to terminate an intraLATA toll call from their end user customer to a SWBT end user customer?

1. Parties' positions

SWBT relies on Section 5.2.2.2.1.1 of Appendix – Pricing – UNE-TX to contend that UNE common transport may be used both to and from the tandem only prior to the implementation of intraLATA dialing parity.[89] After the implementation of dialing parity, SWBT claims that Section 5.2.2.2.1.2.1 requires that UNE common transport be used *only* from the originating unbundled local switch to the tandem (element 2 in Appendix A).[90] The exception to this rule is if the CLEC has the end-user on both the originating and terminating end of the intraLATA toll call; in such a case the CLEC could transport the call using UNE common transport both to and from the tandem (elements 2 and 4 in Appendix A).[91]

SWBT claims that allowing Sage and Birch/ALT to use UNE common transport to terminate an intraLATA call to a SWBT customer would create a pricing distortion in the intraLATA market. SWBT explains that Sage and Birch/ALT would pay UNE rates for tandem and terminating transport facilities at prices that are a fraction of what IXCs

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[89] Direct Testimony of Rachel Bernstein at 4-5, (June 15, 1999).

[90] *Id.* at 6-7.

[91] *Id.* at 7.

have to pay for the same functionality through access charges. SWBT argues that a CLEC should not use UNEs to avoid the application of the access rate structure and that there is no distinction between intraLATA and interLATA traffic, relative to the application of the access rate structure.[92]

Birch/ALT argues that they compensate SWBT for the UNEs they use to provide intraLATA toll service to their end users.[93] Sage claims that its compensation to SWBT is for the various UNEs it uses and not for the types of services that Sage provides over those UNEs.[94] Sage states that the blended transport rate adopted in the interconnection agreement was specifically amended to allow for intraLATA toll calls to traverse SWBT's network.[95]

Sage and Birch/ALT also assert that, according to Section 2.4 in Attachment 6, SWBT must provide access to all available UNEs without restriction. Sage and Birch/ALT note that Section 2.3 in the same attachment states that a CLEC can use one or more elements to provide any technically feasible feature, function or capability that such network element(s) are capable of providing.[96] Birch/ALT observes that it is currently using the common transport UNE for transporting intraLATA toll calls that terminate to SWBT end users and nothing in the interconnection agreement, FTA or FCC rules prevents them from doing so after dialing parity is implemented.[97]

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[92] *Id.* at 13-14.

[93] Direct Testimony of Sean Minter at 13-14 (May 3, 1999)

[94] Direct Testimony of Gary Nuttall at 17 (June 15, 1999).

[95] *Id.* at 9-10.

[96] Rebuttal Testimony of Sean Minter at 4-5 (June 24, 1999).

[97] *Id.* at 13.

2. Discussion

The dispute in this proceeding is over the uses of UNEs and compensation – whether a CLEC can purchase UNEs on the terminating side of an intraLATA toll call[98] and whether access charges or UNE rates apply to these network facilities. The central dispute appears to concern a Sage or Birch/ALT customer's placing an intraLATA toll call to a SWBT customer. All parties agreed that when a CLEC has local end user customers on the originating and terminating end of the intraLATA toll call, the CLEC could purchase UNEs end-to-end[99] and pay SWBT UNE rates for ULS-O, common transport, tandem switching, common transport and ULS-T. (For simplicity, see elements 1, 2, 3, 4 and 5 in Appendix A).[100] With respect to the situation in which a CLEC customer places an intraLATA toll call to another CLEC customer or to another ILEC customer, the CLEC could purchase UNEs up to the meet point[101], as arranged between the CLEC and the other carrier, and pay SWBT UNE rates for these facilities.[102]

Compensation in a pre-dialing parity environment

In analyzing the disputed scenario, it is essential to first describe the network elements purchased by the CLEC and therefore, the compensation paid to SWBT for completing an intraLATA toll call *before* the implementation of dialing parity. Before implementing dialing parity, an intraLATA call from a CLEC customer to a SWBT

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[98] Specifically, elements 3, 4 and 5 (*see* network diagram, Appendix A).

[99] Tr. at 182-183 (July 13, 1999).

[100] According to SWBT's interpretation of the contract, additional elements or business arrangements would be needed to complete such a call (elements 6A, 6B, and non-SWBT tandem in Appendix A). However, all of the elements purchased from SWBT would be UNEs. [*See* Tr. at 133 (July 13, 1999).] As described in the Arbitrators' analysis of DPL Issue Nos. 1, 4 and 10, the Arbitrators reject those arguments.

[101] The meet point for billing can be considered as a demarcation point for purposes of compensation. From this demarcation point on forward, access charges would apply.

[102] Tr. at 54-57; 70-72 (July 13, 1999).

customer was routed using elements 1-5, as shown in Appendix A. The CLEC paid SWBT UNE rates for elements 1-4[103] and paid access charges for element 5.[104] When asked by staff to provide a citation from the interconnection agreement to justify these rates, the Sage witness offered Section 5.2 of Attachment Compensation,[105] which states:

> For intrastate intraLATA interexchange service traffic, compensation for termination of intercompany traffic will be at terminating access rates for Message Telephone Service (MTS) and originating access rates for 800 Service, including the Carrier Common Line (CCL) charge, as set forth in each Party's intrastate access service tariff. For interstate intraLATA service, compensation for termination of intercompany traffic will be at terminating access rates for MTS and originating access rates for 800 service including the CCL charge, as set forth in each party's interstate access service tariff.

Sage and Birch/ALT explained that, although Section 5.2 does not explicitly maintain that a CLEC should pay access charges only for the switching and CCL elements and not for the transport element, it is their understanding that the meet point for billing is the front end (on the trunk side) of the terminating end office.[106] Sage testified that the same meet point for billing logic applies when Sage interconnects with other carriers.[107] The SWBT witness agreed that Section 5.2 of Attachment 12 – Compensation is the basis for charging CLECs access charges. [108]

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[103] All parties agreed that instead of paying UNE rates for elements 2, 3 and 4, the CLEC can pay SWBT the UNE blended transport rate. [*See* Tr. at 160 (July 13, 1999)]. When the UNE blended transport rate element was stipulated between AT&T, MCI and SWBT, an assumption was made that 70% of the calls are direct trunked rather than switched through the tandem. [*See* Tr. at 274-275 (July 13, 1999)].

[104] Response of Sage to Order No. 7 (July 12, 1999). Sage and Birch/ALT pay the access rate for switching and Carrier Common Line ("CCL"). [*See* Tr. at 201 (July 13, 1999)].

[105] Tr. at 196 (July 13, 1999).

[106] *Id.* at 198-200.

[107] Sage Brief at 12 (July 22, 1999); Tr. at 74 (July 13, 1999).

[108] SWBT Brief 10-11 (July 22, 1999); Tr. at 204 (July 13, 1999).

Compensation in a post-dialing parity environment

The dispute concerning UNE usage and compensation for handling intraLATA toll calls in a post-dialing parity environment is intimately tied to the parties' fundamental differences over which facilities are required to terminate intraLATA calls post-dialing parity. SWBT contends that the contract requires identical routing and, therefore, identical compensation for intraLATA toll calls and interLATA toll calls in a post-dialing parity environment. Sage and Birch/ALT, on the other hand, maintain that the routing and the compensation for intraLATA toll calls should remain the same pre- and post-dialing parity.

SWBT relies on language in Sections 5.2.2.2.1.1, 5.2.2.2.1.2, and 5.2.2.2.1.2.1 as the basis for its argument that the contract requires a CLEC to obtain a separate CIC, route its intraLATA toll calls to a POP outside of the SWBT network and pay access charges for the tandem, transport and switch/loop (elements 3, 4 and 5 in Appendix A) on the terminating end of the intraLATA toll call. Section 5.2.2.2.1.1. of Appendix – Pricing – UNE- TX states:

> Until the implementation of intraLATA Dialing Parity, [CLEC] will pay applicable ULS-O, ULS-T, signaling, common transport, and tandem switching charges for all intraLATA toll calls initiated by an [CLEC] Port.

Section 5.2.2.2.1.2 of Appendix – Pricing – UNE – TX states:

> After the implementation of intraLATA Dialing Parity, intraLATA toll calls from [CLEC] ULS Ports will be routed to the end user intraLATA Primary Interexchange Carrier (PIC) choice. When an interLATA toll call is initiated from an ULS port it will be routed to the end user interLATA PIC choice.

Section 5.2.2.2.1.2.1 of Appendix UNE- Pricing states:

> [CLEC] may provide exchange access transport services to IXCs for intraLATA traffic originated by or terminating to [CLEC] local service customers, upon request, using unbundled network elements. For interLATA toll calls and intraLATA toll calls (post dialing parity) that are originated by local customers using SWBT unbundled local switching, [CLEC] may offer to deliver the calls to the PIC at the SWBT access tandem, with [CLEC] using unbundled common transport and tandem switching to transport the call from the originating unbundled local switch to the PIC's interconnection at the access tandem. When the PIC agrees to take delivery of toll calls under this arrangement, then [CLEC] will pay SWBT ULS-O usage, signaling, common transport, and tandem switching for such calls. SWBT will not bill any access charges to the PIC under this arrangement. [CLEC] may use this arrangement to provide exchange access services to itself when it is the PIC for toll calls originated by [CLEC] local customers using SWBT unbundled local switching.

Under SWBT's interpretation of these provisions, an intraLATA toll call must be routed in a manner similar to an intraLATA toll call handled by an IXC. This would force Sage and Birch/ALT to obtain a separate CIC. The call would have to be sent to a POP outside of the SWBT network, to a non-SWBT tandem. This interpretation implies that the CLEC would not be able to use UNEs from the non-SWBT tandem forward[109] and the compensation for using the network elements needed to complete the call would be in the form of access charges.

The issue of routing has been analyzed at length under DPL Issue Nos. 1 and 4. The Arbitrators rejected SWBT's position that the contract requires intraLATA toll calls to be physically routed and transported in the same way as interLATA toll calls. SWBT's contention regarding the application of access charges for elements 3 and 4 in post-dialing parity scenario flows from its position that the routing should be similar to that of an interLATA call carried by an IXC. In light of the Arbitrators' conclusion regarding routing, the Arbitrators find SWBT's position regarding access charges to be untenable.

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[109] Elements 3 (when the call returns to SWBT tandem from non-SWBT tandem), 4 and 5.

The Arbitrators also note that the last sentence in Section 5.2.2.2.1.2.1 uses permissive language: "[CLEC] may use this arrangement to provide access services to itself when it is the PIC for toll calls...". Section 5.2.2.2.1.2.1 provides an option for CLECs rather than imposing a requirement for CLECs to use this arrangement.

Other Contractual Provisions

It is necessary to consult other sections in the agreement to shed light on the compensation issue. As was discussed earlier, SWBT, Sage and Birch/ALT agree that Section 5.2 – Attachment 12 - Compensation was the basis for the compensation for intraLATA tolls calls in a pre-dialing parity environment. SWBT's witness agreed that Section 5.2 requires Sage and Birch/ALT to pay access charges only for the terminating switching end office and the CCL access charge in a pre-dialing parity environment.[110] SWBT contends that Section 5.2 requires that compensation for intraLATA toll service in a post-dialing parity environment be the same as for interLATA toll service.[111] But Section 5.2 does not make any distinction between compensation for intraLATA toll traffic in a pre-dialing parity and post-dialing parity environment; moreover, it does not address compensation for interLATA toll service at all.

Section 8.1.1 of Attachment 6 -UNE-TX defines common transport as "a shared interoffice transmission path between SWBT switches." Specifically, Section 8.1.1 provides that the UNE common transport permits a CLEC to utilize SWBT's common network between a SWBT tandem and a SWBT end office. Section 8.1.1 neither differentiates between the originating and terminating side of the routing scheme nor makes a distinction between pre- and post-dialing parity environments. SWBT's witness agreed that there were no restrictions in Section 8.1.1 on the use of the common transport

[110] Tr. at 201-204 (July 13, 1999).

[111] SWBT Reply Brief at 4 (July 28, 1999).

UNE.[112] When the SWBT witness was asked by staff to provide the citation upon which SWBT bases its UNE usage restriction,[113] the SWBT witness referred to section 5.2.2.2.1.2.1 in Appendix Pricing – UNE.[114] The SWBT witness provided no other citation from the interconnection agreement or the FTA to support this position, but did mention FCC's Third Order on Reconsideration.[115] At a later point in the hearing, the SWBT witness testified that SWBT is not restricting the use of the common transport UNE.[116]

Several provisions in the UNE-Attachment address the issue of use of UNEs. Section 2.4 of the UNE Attachment permits a CLEC to combine any UNE with any other element, without restriction. Section 2.4.1 of the UNE-Attachment mandates that "when [CLEC] orders UNEs in combination, and identifies to SWBT the type of telecommunications service it intends to deliver to its end-user customer through that combination (e.g., POTS, ISDN), SWBT will provide the requested elements with all the functionality, and with at least the same quality of performance ... that SWBT provides through its own network to its local exchange service customers receiving equivalent service, unless [CLEC] requests a lesser or greater quality of performance through the Special Request process..."

FCC Requirements

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[112] Tr. at 242-243 (July 13, 1999).

[113] "The contract requires that Sage use the unbundled common transport directly between its own end user and the access tandem." [*See* Direct Testimony of Rachel Bernstein at 7 (June 15, 1999)].

[114] Tr. at 240-241 (July 13, 1999).

[115] *Id.* at 241.

[116] *Id.* at 243-244.

The Arbitrators also note that the FCC has extensively addressed the issue of appropriate use of UNEs and compensation for such use. The Arbitrators agree with SWBT that the FCC found that, because loops and switches are dedicated to a particular customer line, as a practical matter, a carrier that purchases unbundled loop and switching elements will have to provide access to local service, as well as interexchange services and other services requested by that customer.[117] However, neither Sage nor Birch/ALT has disputed payment of access rates for the local switching and loop elements (element 5 in Appendix A) on the terminating end of an intraLATA toll call.[118]

Such limits, however, were not placed on shared network elements such as tandem switching and common transport. The FCC acknowledged that for shared elements, carriers are purchasing access to a functionality of an ILEC facility on a minute-of-use basis.[119] A CLEC must have access to all of the features and functions of a UNE in order to be able to offer services that compete with those offered by the ILEC.[120] The UNEs should be provided under just and reasonable terms and conditions that provide an efficient competitor with a meaningful opportunity to compete.[121] According to the FCC, Congress intended the FTA to promote competition for toll services, as well as for local exchange and exchange access services.[122]

In its Third Order on Reconsideration, the FCC provided more guidance on the use of unbundled dedicated and shared transport in transporting interexchange traffic.

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[117] SWBT Brief at 8-9 (July 22, 1999); First Report and Order at ¶357 (loops); Order on Reconsideration at ¶¶12-13 (switching).

[118] Sage and Birch/ALT pay the access rates for the terminating loop and end office switching. [*See* Tr. at 201 (July 13, 1999)].

[119] First Report and Order at ¶258.

[120] *Id.* at ¶260.

[121] *Id.* at ¶315.

[122] *Id.* at ¶361.

The FCC clarified that a carrier may use unbundled shared or dedicated transport to provide exchange access service to customers to whom it is also providing local service.[123] A possible conclusion would be that the FCC allows the use of a UNE transport element only when the CLEC has the end user on the terminating end of an intraLATA toll call.[124] Assuming this interpretation is valid, the Arbitrators note that the FCC does not make a distinction between pre- and post-dialing parity environments in applying this restriction on the UNE transport element. Another plausible interpretation is that the FCC did not address the issue of whether a requesting carrier may use an unbundled transport element to transport interexchange traffic to and from customers to whom the requesting carrier does not provide local exchange service. It should be noted that the FCC issued a Notice of Proposed Rulemaking (NPRM) following the Third Order on Reconsideration, asking for comments regarding the use of unbundled shared and dedicated transport to originate or terminate toll traffic to customers to whom the requesting carrier does not provide local service.[125] However, the FCC has not settled this issue at this time.

But the FCC did address the issue of whether access charges apply to UNEs. In its First Report and Order, the FCC concluded that section 251(c)(3) permitted IXCs and all other requesting telecommunication carriers to purchase UNEs for the purpose of offering exchange access services, or *for the purpose of providing exchange access to themselves* in order to provide interexchange services to consumers.[126] Furthermore, the FCC rejected arguments from incumbent LECs that requesting carriers using UNEs must continue to pay access charges. The FCC found that when IXCs purchase UNEs, they are not purchasing exchange access "services" and that access charges apply where incumbent LECs retain local customers and continue to offer exchange access services to

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[123] Third Order on Reconsideration at ¶38, 39.

[124] SWBT Brief at 9-10 (July 22, 1999).

[125] Third Order on Reconsideration at ¶61.

[126] First Report and Order at ¶356.

IXCs who do not purchase UNEs.[127] The FCC went further and explained that requiring CLECs to pay access charges in addition to the unbundled element rate would create a situation in which the ILEC is being compensated in excess of its underlying network costs and would be inconsistent with the pricing standard for UNEs set in the FTA.[128]

Parity Issues and Competitive Implications

SWBT argues that allowing Sage and Birch/ALT to route their intraLATA traffic using the common transport UNE on the terminating end of the call would create a pricing distortion because CLECs can route calls at a fraction of the cost their IXC competitors pay. Again, SWBT's analysis rests on comparing a CLEC (Sage or Birch/ALT) to an IXC. As the Arbitrators noted above, in a pre-dialing parity environment, Sage and Birch/ALT paid UNE rates for the common transport element on the terminating side of the call even if they did not have the end user customer. On the other hand, IXCs paid access rates when using an equivalent transport element.[129] The so-called "distortion" that SWBT complains of existed in the pre-dialing parity environment and did not prevent the creation of a competitive toll market.

Adopting SWBT's interpretation of the contract regarding routing and compensation could, arguably, address the disparity between IXCs and CLECs. However, this approach, in turn, would create disparity between SWBT and CLECs and could potentially impair the competitive telecommunications market. Sage and Birch/ALT are slowly making inroads in the local exchange market and to remain

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[127] *Id.* at ¶358.

[128] *Id.* at ¶363.

[129] In a pre-dialing parity environment, an IXC was able to carry an intraLATA toll call if a customer "dialed around." [*See* Direct Testimony of Rachel Bernstein at 9-10 (June 15, 1999)]. In such a situation, the intraLATA call was routed to a POP outside of SWBT's network and, upon returning to the network, SWBT collected access charges from the IXC for the transport element ending at the terminating end office (element No. 5).

competitive with SWBT, they must offer a full panoply of services to their customers. Sage's business plan, for instance, focuses on residential and small business customers in rural and suburban communities outside the metropolitan areas of Texas.[130] Sage offers its customers packages of local, toll and long distance services.[131] For Sage to accept SWBT's position would mean an increase in the cost of doing business in Texas, both in terms of acquiring additional facilities and the delay involved in implementing SWBT's routing requirements, and in payment of access charges. If Sage were to flow these costs through to its customers, the customers may be left with little choice among telecommunication carriers. An IXC would not be able to offer these customers a cheaper intraLATA service, since the IXC itself would be subject to access charges and SWBT has indicated that it does not plan to offer intraLATA toll service to CLEC customers.[132] The CLEC customers may be left with little competitive choice other than switching back to SWBT, the incumbent carrier, for local and intraLATA toll service.

The Arbitrators find that the issue here is not parity between an IXC and a CLEC but rather between an ILEC and a CLEC, both of whom are local exchange providers serving as intraLATA toll providers. A more relevant comparison is whether access charges paid by SWBT are in parity with CLECs' access charges.[133] The Arbitrators note that Sage testified that when a SWBT local end user customer places an intraLATA toll call to a Sage customer, SWBT pays Sage access charges only for terminating local switching and not for transport.[134] Therefore, SWBT and the CLECs are in parity regarding access charges. The nature of the traffic (intraLATA toll service) before and after intraLATA dialing parity remains the same. Therefore, parity between ILECs and

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[130] Direct Testimony of Gary Nuttall at 5-6 (June 15, 1999).

[131] *Id.* at 6-8.

[132] Reply Brief of SWBT at 11 (July 28, 1999).

[133] SWBT Brief at 13 (July 22, 1999).

[134] Tr. at 237-238 (July 13, 1999).

CLECs demands that, in a post-dialing parity environment, Sage and Birch/ALT be allowed to continue using SWBT's network end-to-end on a UNE basis and pay terminating access charges only for the terminating switch and loop (element 5), as they did in a pre-dialing parity environment.

Recent Commission Decision

The Arbitrators also rely on recent Commission decision for assistance on this issue. In the Waller Creek Arbitration[135] the Commission addressed the issues of UNE usage and access charges bypass. The Commission allowed Waller Creek Communication (WCC), as a CLEC, to use the UNE dark fiber to offer exchange access services to an IXC that transports interexchange traffic, regardless of who is serving the retail, local end use customer. Regarding access charges bypass, the Commission ruled that the only relevant subsidy is the residual interconnection charge (RIC). The Commission required that, if WCC utilizes the UNE dark fiber, (or any other UNE), purchased from SWBT, to provide wholesale transport service to a non-CLEC IXC, WCC must collect the RIC from that wholesale customer and remit it to SWBT, if SWBT is serving the local end user.[136] This should be done, the Commission ruled, until the RIC is removed from SWBT's tariffs in accordance with the Commission USF proceedings.[137]

The Arbitrators note two differences between the issues in dispute in the Waller Creek proceeding and in the current proceeding. The first difference is that in Waller

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[135] Petition of Waller Creek for Arbitration with Southwestern Bell Telephone Company; Complaint of Waller Creek Communication Inc. for Post Interconnection Agreement Dispute Resolution with Southwestern Bell Telephone Company. Docket Nos. 17922 and 20268.

[136] Order on Reconsideration of Second Order on Appeal of Order Nos. 9 and 2 at 1-2 (June 10, 1999).

[137] The RIC for SWBT was eliminated by the Commission on September 1, 1999. [*See* Docket No. 21184 Final Order (September 1, 1999)].

Creek, the transport element in dispute was dark fiber, whereas in the current proceeding, the transport element is common transport. This difference is relatively minor, as both dark fiber and common transport are sub-categories under the UNE interoffice transport element and the Commission did not limit its award solely to dark fiber.[138]

The second noticeable difference is the use of UNEs for the provision of exchange access by a CLEC as a wholesale provider, versus a CLEC as a retail toll provider. WCC was allowed as a CLEC, in its capacity as a wholesale provider, to use UNEs to offer exchange access services to IXCs. The Arbitrators note that a logical extension of the Waller Creek award would be to allow a CLEC to use UNEs to provide exchange access to *itself* if the CLEC is using this transport element to complete an intraLATA toll call, distinct from IXC traffic, originated from its local end user customer. The underlying policy in the Commission's Waller Creek Order appears to be promotion of competition in the wholesale market.[139] The policy goal in this proceeding is to promote competition in the intraLATA toll market by allowing a CLEC to use UNE common transport to complete intraLATA toll calls and thereby provide intraLATA toll service to its end user customers.[140] This conclusion would be consistent with the FCC's requirement that IXCs and other requesting telecommunication carriers may purchase UNEs *for the purpose of offering exchange access services or the purpose of providing exchange access services to themselves* in order to provide interexchange services to consumers.[141]

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[138] "WCC can use UNE dark fiber (or other UNEs) to carry traffic for any other telecommunication provider..." [*See* Order on Reconsideration of Second Order on Appeal of Order Nos. 9 and 2 at 1-2 (June 10, 1999)].

[139] "...WCC will be able to provide wholesale access to any telecommunication provider, thus enhancing competition" [*Id.* at 11 (June 10, 1999)].

[140] The FCC recognized that FTA 96 was intended to promote competition for not only the local and exchange access market but also for the toll market through the use of UNEs. (*See* First Report and Order at ¶ 361).

[141] FCC's First Report and Order at ¶356.

3. Arbitrators' Ruling

The Arbitrators conclude that Sage and Birch/ALT are not restricted from purchasing unbundled interoffice transport on the terminating side of the tandem regardless of whether they serve the local end user on the terminating end of an intraLATA toll call. The Arbitrators rule that Sage and Birch/ALT should not be required to pay access charges for elements 3 and 4 (tandem switching and common transport) after dialing parity is implemented. The use of the common transport UNE, or any other UNE, for that matter, cannot be limited in any way by the type of traffic that passes through it. Since, after implementing dialing parity, intraLATA calls should be routed in the same way as they were routed before dialing parity was implemented, the Arbitrators see no reason why a CLEC should compensate SWBT differently than it did before dialing parity was implemented.[142] It is clear that Section 5.2 in Attachment - Compensation of the interconnection agreement does not delineate any difference between pre -and post-dialing parity.[143]

F. DPL Issue Nos. 8 and 9

DPL Issue No. 8: Is Birch/ALT or Sage required to notify SWBT regarding their end user's intraLATA PIC selection in order for SWBT to route the end user's intraLATA toll calls to the intraLATA PIC selected by the end user?

DPL Issue No. 9: Should a CLEC be required to generate separate LSRs to enable a CLEC existing customer to default to existing CLEC intraLATA toll provider?

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[142] Also, SWBT never claimed during the proceedings that the UNE rates for common and blended transport do not adequately compensate SWBT for carrying toll traffic. In any case, the Arbitrators note that before implementing dialing parity, common transport was used to carry toll traffic and SWBT did not claim it was insufficiently compensated.

[143] Sage Brief at 13 (July 22, 1999).

1. **Parties' positions**

SWBT claims that Section 5.2.2.2.1.2 in Appendix Pricing – UNE requires it to route intraLATA calls to the LPIC selected by the end user. SWBT states that it cannot know the end user's LPIC selection without the CLEC's notifying it of the selection.[144]

SWBT's position regarding generation of separate LSRs evolved during the proceedings. In the Accessible Letter dated April 6, 1999,[145] SWBT required the CLECs to submit separate LSRs for all CLEC customers. Later, as part of its rebuttal testimony, SWBT offered the option of a one-time conversion process in which the CLEC would submit a single spreadsheet for each central office (limited to 20 accounts). SWBT proposed to charge a $2.58 PIC-change charge, plus $0.05 for each account shown on the spreadsheet.[146] During the hearing, SWBT agreed to work with the CLEC on a different process [147] and not charge the CLEC for it.[148]

Sage proposes to notify SWBT through the LSR process only if any of its customers affirmatively chooses an LPIC different from Sage.[149] Birch/ALT relies upon P.U.C SUBST. R. 26.275(f)(2)(B), which holds that customers who do not affirmatively choose an LPIC would default to their existing carrier.[150] According to Sage, default is one that does not require any additional work by the customer or the carrier.[151]

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[144] Direct Testimony of Rachel Bernstein at 12 (June 15, 1999).

[145] Direct Testimony of Gary Nuttall at 29 (June 15, 1999).

[146] Rebuttal Testimony of Rachel Bernstein at 8 (June 24, 1999).

[147] Tr. at 311 (July 13, 1999).

[148] *Id.* at 312.

[149] Direct Testimony of Gary Nuttall at 20 (June 15, 1999).

[150] Direct Testimony of Sean Minter at 10-11 (May 3, 1999).

[151] Sage Brief at 17-18 (July 22, 1999).

Sage and Birch/ALT contend that there is no need for them to submit separate LSRs for all customers that affirmatively choose them as their intraLATA toll provider, or who failed to make an affirmative choice. Sage explains that generating LSRs, even using the mechanized process proposed by SWBT, would expend significant time and effort, in addition to the charges assessed by SWBT.[152] Specifically, Sage's witness testified that the generation of LSRs by Sage would entail securing the customer file, producing the work order, generating information for the LSR, obtaining the FOC and following through to ensure proper implementation.[153] In addition, under its proposal, SWBT would assess Sage a charge of $3.58 per order if the order contained the maximum of 20 customer accounts.[154] Birch/ALT agreed that it would have to go through a process similar to the one described by Sage.[155]

2. Discussion

The issue here is notification of SWBT by Sage and Birch/ALT. Clearly, notification is essential and is a CLEC's responsibility. Sage's witness also agreed that there is a need to communicate information regarding the CLEC's customer LPIC choice to SWBT.[156]

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[152] Rebuttal Testimony of Gary Nuttall at 8 (June 24, 1999); Tr. at 291-292 (July 13, 1999).

[153] Tr. at 290-291 (July 13, 1999).

[154] Rebuttal Testimony of Rachel Bernstein at 8 (June 24, 1999).

[155] Tr. at 293 (July 13, 1999).

[156] *Id.* at 309.

Sage and Birch/ALT assert that both processes suggested by SWBT, first in its Accessible Letter and then the one-time conversion process described in its rebuttal testimony, would cause them to incur unreasonable costs, including both the costs associated with the labor time for generating LSRs and the fees charged by SWBT for the conversion process itself. Sage explained that the meaning of "default" is that there be no additional work for the carrier or the customer. While some additional work seems inevitable (e.g., the process of notifying the customer on the change is one that cannot be avoided), because SWBT and all the other carriers would encounter the same amount of additional work, this obligation is a parity obligation. However, the conversion process suggested by SWBT could endanger CLEC customers since a human error in processing the LSR (or any other type of form) may result in a customer's being slammed.[157]

It is apparent that when a CLEC customer chooses the local carrier as the LPIC or does not make an affirmative choice, SWBT cannot know the end user's LPIC selection without being notified of the selection by the CLEC.[158]

3. Arbitrators' Ruling

It is the Arbitrators' ruling that a CLEC should notify SWBT using an LSR only if a CLEC customer affirmatively chooses a different LPIC. As the Sage witness testified, when a Sage customer chooses an LPIC other than Sage itself, Sage already notifies SWBT of the customer's choice using an LSR.[159] SWBT should convert all the other customers for which the CLEC submitted, in the pre-dialing parity environment, LSRs

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[157] Tr. at 308-309 (July 13, 1999).

[158] SWBT's Brief at 15 (July 22, 1999).

[159] For three (out of approximately 10,000) Sage customers who chose an intraLATA provider different from Sage, Sage has submitted SWBT separate LSRs that included the appropriate CIC. [*See* Tr. at 174 (July 13, 1999)].

with LPIC field populated by "Not Applicable" (N/A) to the CLEC (serving as the LPIC). In order to prevent errors, this conversion process would take place after SWBT receives the CLEC's notification letter, informing SWBT that all of the existing customers, besides those for which a separate LSR was submitted, have either chosen the CLEC as their LPIC or have not made an affirmative choice. The Arbitrators recognize that SWBT may incur costs to implement this one-time conversion process. SWBT may, therefore, impose a reasonable, cost-based charge on Sage and Birch/ALT to recover the costs associated with the one-time conversion process. The Arbitrators order that the interim solution in Order No. 3 remain in place until a one-time conversion charge is developed.

For new customers that choose an intraLATA toll provider different from the serving CLEC, SWBT would be notified via an LSR in which the LPIC field would be populated with the CIC of the selected carrier. Because SWBT did not provide an explanation for its need for a CIC for new customers, other than as a routing mechanism[160], the CLEC should be able to populate the LPIC field in the LSR for new customers that select the CLEC as the LPIC with "N/A", as it did for existing customers in a pre-dialing parity environment.[161] An LSR with the LPIC field populated with "N/A" should serve as a notification to SWBT that the customer has selected its serving CLEC as the intraLATA toll provider.

III. Conclusion

The Arbitrators conclude that the foregoing Arbitration Award reflects a resolution of the disputed issues presented by the parties for arbitration. The Arbitrators

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[160] Arbitrators' analysis of DPL Issue No. 10.

[161] Direct Testimony of Sean Minter at 9 (May3, 1999).

find that their resolution of the issues complies with the standard set in FTA 252(c), the relevant provisions of PURA, and the Commission's dispute resolution rules.

SIGNED AT AUSTIN, TEXAS on the 4th day of November 1999.

D. Diane Parker

D. Diane Parker
Co-Arbitrator

Meena Thomas

Meena Thomas
Co-Arbitrator

Staff Advisors:
Shay Mallik
Anne McKibbin

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APPENDIX A

Legend
Element 1: Originating loop and switch
Element 2: Common transport
Element 3: SWBT tandem
Element 4: Common transport
Element 5: Terminating loop and switch
Elements 6A and 6B: Entrance facilities
Element 7: Direct trunk
Element 8: Direct trunk
Element 9: Direct trunk